# OLR RESEARCH REPORT

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## QUESTIONABLE ANTI-SOCIAL BEHAVIOR IN CYBER CHAT ROOMS

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You asked if there are any laws regarding "questionable anti-social behavior" in cyber chat rooms. You asked if such behavior falls under the First Amendment's freedom of speech umbrella.

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### SUMMARY

A cyber chat room is an area on a computer network or the Internet where participants can engage in interactive discussions with one another. The primary purpose of an online chat room is to communicate information with other people through text in real time.

The First Amendment of the U.S. Constitution protects most speech from government regulation. While it would appear that such protections would extend to conduct in online chat rooms, case law has determined that certain narrowly defined categories of speech or conduct do not receive constitutional protection anywhere. These include: (1) threats, (2) advocating imminent lawless action, (3) inciting imminent violence ("fighting words"), (4) obscenity, (5) child pornography, (6) libel, and (7) copyright or trademark infringements. Moreover, the courts have ruled that speech or conduct that becomes harassment or stalking is not protected by the First Amendment under certain circumstances, and that speech aiding or abetting a crime is likewise not protected.

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In addition to case law, there are several federal and state laws that specifically address electronic communications, while other generally applicable laws can apply to certain speech or conduct in an online chat room, although these statutes do not specifically mention electronic or Internet communications.

## FIRST AMENDMENT FREEDOM OF SPEECH

In general, the First Amendment prohibits the regulation of speech based on its content. But, valid time, place, or manner restrictions on content-neutral speech are constitutional if they are (1) narrowly drawn, (2) serve a significant government interest, and (3) leave open ample alternative channels of communication (*Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989)). The U.S. Supreme Court extended the protection of the First Amendment to the Internet in *Reno v. ACLU*, 117 S.Ct. 2329 (1997) when it struck down portions of the Communications Decency Act (CDA) that prohibited "indecent" online publications.

Despite favoring the First Amendment's protection of speech, the Court has enumerated several narrowly defined areas to which the First Amendment protection does not extend.

### *Threats*

The Supreme Court has ruled that a "true threat" is not protected by the First Amendment. A true threat is where a speaker means to communicate a "serious expression of intent to commit an unlawful act of violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). One type of true threat is intimidation, where the speaker directs a threat toward a person or group of people "with the intent of placing the victim in fear of bodily harm or death." *Id.* at 360. *See also R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992); *Watts v. United States*, 394 U.S. 705, 708 (1969).

### *Speech Advocating Lawless Action*

The Court has held that speech that advocates lawless action is not protected by the First Amendment. Speech advocating lawless action is not merely advocating the use of force or violation of the law. It must be directed to incite or produce imminent lawless action and be likely to do so (*Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

### *"Fighting Words"*

Speech that incites violence, commonly known as "fighting words," has been defined as "words that by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942). The Court has more recently narrowed the definition of fighting words to exclude mere inconvenience, annoyance, or offensive content, and to include only "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reactions." *Cohen v. California*, 403 U.S. 15, 20 (1971). Additionally, states may not prohibit only certain fighting words based on their content. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992).

### *Obscenity*

The test for "obscene" material was established in *Miller v. California*, 413 U.S. 15, 24 (1973):

1. whether the average person, applying contemporary community standards, would find that the material, taken as a whole, appeals to the prurient interest,

2. whether the material depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

3. whether the material, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The reference to "community standards" means that what might be considered obscene in one locality is not necessarily obscene in another.

### *Child Pornography*

The Supreme Court has ruled that child pornography is not entitled to any protection under the First Amendment. In *New York v. Ferber*, 458 U.S. 747 (1982), the Court held that the U.S. Constitution does not forbid states from prohibiting the sale of material depicting children engaged in sexual activity.

### *Libel*

Libel generally refers to written false statements of fact that harm another's reputation and are distributed to a third party. Public officials and public figures must prove "actual malice" in a libel claim, which includes either (1) knowledge that the statement was false or (2) a reckless disregard for the statement's falsity. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

### *Copyright and Trademark Infringements*

The Court has determined that there is no First Amendment protection for disseminating speech owned by others, such as copyrights and trademarks. In *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 555-60 (1985), the Supreme Court upheld copyright law against a First Amendment free speech challenge.

### *Stalking and Harassment*

Conduct such as stalking and harassment may be prohibited without violating the First Amendment if the prohibition (1) satisfies one of the previously listed categories (often threats or fighting words); (2) the prohibition is a valid time, place, or manner restriction on content-neutral speech; or (3) is narrowly tailored to meet a compelling governmental interest. *See People v. Klick*, 66 Ill. 2d 269, 272 (1977); *State v. Hagen*, 27 Ariz. App. 722, 725 (1976).

### *Aiding or Abetting a Crime*

The Fourth Circuit Court of Appeals (whose decisions are not binding on Connecticut) noted that every court addressing the issue has held that the "First Amendment does not necessarily pose a bar to liability for aiding and abetting a crime, even when such aiding and abetting takes the form of the spoken or written word." *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 244 (4th Cir. 1997). This is because "culpability in such cases is premised, not on defendants' advocacy of criminal conduct, but on defendants' successful efforts to assist others by detailing to them the means of accomplishing the crimes." *Id.* at 246.

## FEDERAL AND STATE STATUTES

Several federal and state laws could conceivably address conduct in an online chat room. Some of the laws are specifically designed to apply to this setting through explicit mention of electronic communication, the Internet, or computers. Others are more implicit in their application. For example, a generally applicable statute might refer to all devices or methods of communication, or it might not specify any particular setting.

### *Federal Laws*

At least three major federal laws could be applied to questionable online behavior: the (1) Interstate Stalking Punishment and Prevention Act, (2) Interstate Communications Act, and (3) Telephone Harassment Act. The first two have been amended several times by the Violence Against Women Act (VAWA, PL 103-322), which was recently reauthorized (S. 47, 113th Cong. (2013)). A 1996 VAWA amendment (1) made cyberstalking a federal crime, (2) updated statutory definitions by adding new forms of cybertechnology, and (3) stiffened federal penalties.

***Interstate Stalking Punishment and Prevention Act.*** The 1996 Interstate Stalking Punishment and Prevention Act, as amended by VAWA, is the broadest of these federal statutes. It makes it a crime for anyone who "travels" in interstate or foreign commerce to use the mail, any interactive computer service, or any interstate or foreign commerce facility to engage in a course of conduct that causes substantial emotional distress to a person or causes the person or a relative to fear for his or her life or physical safety (18 USC § 2261A). In 2011, a federal district court in Maryland declared unconstitutional the statute's use of the terms "harass" and "substantial emotional distress" as applied to a Twitter or blog post because they were overbroad, vague, and impermissibly regulated content-based speech. *United States v. Cassidy*, 814 F. Supp. 2d 574 (D. Md. 2011).

***Interstate Communications Act.*** Under the Interstate Communications Act, it is a crime to transmit in interstate commerce any communication that threatens to injure or kidnap anyone (18 USC § 875(c)).

***Telephone Harassment Act.*** The Telephone Harassment Act makes it a crime to knowingly use a telephone or the Internet to transmit in interstate or foreign commerce any message to annoy, abuse, harass, or threaten anyone (47 USC § 223(a)(1)(C)). A major limitation of this law is that it applies only to direct communications (for example, email or cell

phone calls) between the harasser and victim. *See* Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 Berkeley Tech. L.J. 1103, 1119 (2011). It does not appear to cover messages posted on Internet bulletin boards or webpages, social networking sites, or other one-way communications. *Id.* However, certain transmissions in online chat rooms could be covered.

***Connecticut Laws***

Connecticut has several criminal laws that could potentially be used to prosecute questionable anti-social behavior in cyber chat rooms. These include, but are not limited to, laws that prohibit cyberstalking, cyberharrassment, enticing a minor, misrepresentation of age to entice a minor, threats, and cyberbulling.

It is possible that Connecticut's laws that prohibit cyberstalking (CGS § 53a-181d and -181e) could be applied to conduct in online chat rooms. OLR Report 2012-R-0293 provides a detailed discussion of Connecticut cyberstalking laws and the 2012 amendment to those laws, as well as background information regarding these types of laws. OLR Reports 2009-R-0117 and 2009-R-0121 provide further information about cyberstalking laws in Connecticut and elsewhere.

***Harassment in the Second Degree (CGS § 53a-181d).*** Under this law, a violation occurs when a person:

1. addresses another in indecent or obscene language by telephone;

2. communicates with another person by mail, facsimile, computer network, or any other form of written communication with intent to harass, annoy, or alarm that person and in a manner likely to cause annoyance or alarm; or

3. makes a telephone call, regardless of whether a conversation ensues, with intent to harass, annoy, or alarm another person and in a manner likely to cause annoyance or alarm.

***Harassment in the First Degree (CGS § 53a-182b).*** A violation of this law occurs when a person:

1. threatens to kill or physically injure another person with the intent to harass, annoy, alarm, or terrorize that person;

2. communicates that threat by telephone, mail, computer network, or any other form of written communication in a manner likely to cause annoyance or alarm; and

3. has been convicted of a felony under certain statutes.

***Enticing a Minor (CGS § 53a-182b).*** A violation occurs when a person uses an interactive computer service to knowingly persuade, induce, entice, or coerce anyone under 16 years of age to engage in prostitution or sexual activity for which the actor may be charged with a criminal offense.

***Misrepresentation of Age to Entice a Minor (CGS § 53a-90b).*** A person violates this statute when, in violating CGS § 53a-182b (enticing a minor), the person intentionally misrepresents his or her age.

***Threatening in the Second Degree (CGS § 53a-62).*** There are three ways someone can be prosecuted under this statute:

1. by physical threat, a person intentionally places or attempts to place another person in fear of imminent serious physical injury;

2. a person threatens to commit any crime of violence with the intent to terrorize another person; or

3. a person threatens to commit a crime of violence in reckless disregard of the risk of causing such terror.

***Threatening in the First Degree (CGS § 53a-61aa).*** A person can be prosecuted under this statute if he or she:

1. threatens to commit a crime involving the use of a hazardous substance with intent to terrorize another person, cause evacuation of a building, or cause serious public inconvenience;

2. threatens to commit a crime of violence with intent to cause evacuation of a building or serious public inconvenience;

3. makes either of the two threats described above but with a reckless disregard for the consequences rather than a specific intent to cause terror, evacuation, or inconvenience; or

4. commits threatening in the second degree (CGS § 53a-62) and, while doing so, (a) uses, (b) is armed with and threatens to use, (c) displays, or (d) represents that he possesses, a firearm.

***Bullying and Cyberbullying by Students (CGS § 10-222d).*** This statute prohibits bullying and cyberbullying in schools. The statute defines cyberbullying as "any act of bullying through the use of the Internet, interactive and digital technologies, cellular mobile telephone or other mobile electronic devices or any electronic communications." Schools can prohibit bullying that takes place outside of the physical school setting if the bullying:

1. creates a hostile environment at school for the student against whom the bullying was directed,

2. infringes on the rights of the student being bullied at school, or

3. substantially disrupts the education process or the orderly operation of a school.

### *Constitutionality of Cyberbullying Statutes*

Forty-seven states, including Connecticut, have enacted laws that explicitly address either cyberbullying or electronic harassment (OLR Report 2013-R-0012). They have done so in the absence of U.S. Supreme Court guidance about whether students have a First Amendment right to electronically post school-related comments while off school grounds, which is where many cyberbullying issues arise. Accordingly, some states have inserted language in their cyberbullying laws from the seminal Supreme Court student speech case *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), in order to remain aligned with the current rule, which permits school discipline for student speech that causes a "substantial disruption of or material interference with school activities" or "substantial disorder or invasion of the rights of others." *Id.* at 513-14.

## SOURCES AND FURTHER READING

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